No. 90-437

In the
Supreme Court of the United States
October Term, 1990

HARRIS A. GROTE,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., FRED VANHOOSEN, DOUGLAS HEGGIE, LAWRENCE MARINELLI, M.D., BRADFORD BERG, and DOES 1 through 100, inclusive,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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1. The bulk of respondents' argument against granting certiorari is devoted to contending that the court below correctly held that the test for deciding whether state law retaliatory discharge claims are preempted by the Railway Labor Act ("RLA"), in conjunction with the collective bargaining agreement ("CBA"), is different from, and would preempt far more state law claims than, the test under the Labor-Management Relations Act ("LMRA"). Opposition at 9-14, 17-18 ("Opp. 9-14, 17-18"). Only at the very end of their opposition do respondents address the question whether there is a split in

the circuits, which they deny on the theory that the cases contrary to the ruling below are "distinguishable on their facts." Opp. 19.

The petition makes clear our disagreement with respondents' defense of the Ninth Circuit's ruling on the merits. Thus, the case on which respondents principally rely in support of their merits argument, *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), involved a claim that was squarely based on the contract, but that was said to avoid preemption because damages rather than injunctive relief was sought. And respondents' effort to distinguish *Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985), *dismissing appeal from Puchert v. Agsalud*, 677 P.2d 449 (Haw. 1984), because the parallel contract clause that was alleged to preempt the state discharge claim there was different than the contract clause at issue here, Opp. 17-18, is incomprehensible. The point is that the dismissal of the appeal in *Puchert* stands for the proposition that state claims are preempted only if "the resolution of the dispute in question hinge[s] on application or interpretation of the CBA," Opp. 17, *quoting Puchert*, 677 P.2d at 454, which is the test adopted for the LMRA in *Lingle v. Norge*, 486 U.S. 399 (1988), and rejected by the court of appeals for the RLA here. We also find curious respondents' heavy reliance on the denial of certiorari in three cases (two of them pre-*Lingle*) as authority on the merits. Opp. 10-12.

But, most significant for the question of whether to grant certiorari, respondents concede that most other courts treat RLA and LMRA preemption "interchangeably," Opp. 19-20, just as this Court has done.[1] Indeed, respondents nowhere

[1]In addition to the federal court decisions, cited in the Petition at 9 n.5, that applied *Lingle*'s "dependent on CBA interpretation" test for RLA preemption, several state courts have adopted that test in RLA cases. *Maher v. N. J. Transit*, 239 N.J. Super. 213, 570 A.2d 1289, 1294-1295

deny that, given the size and economic importance of the transportation industry, the question of the standards by which courts ought to decide whether state law retaliatory discharge claims are preempted is an important one that merits plenary review by this Court.

2. Respondents imply that the question urged in the petition is not squarely presented here. They rely on the court of appeals' statement that petitioner's claim is "at least 'arguably governed' by the [CBA]," Opp. 15, *citing* Pet. App. 5a, and argue that this test is "not inconsistent" with the *Lingle* rule that state law claims are preempted by the LMRA only if they are "substantially dependent" on an interpretation of the CBA. Opp. 15-16.

Elsewhere, however, respondents concede that the preemption test applied here differs from the *Lingle* test, a difference that respondents contend is justified, Opp. 9-14, and their rephrasing of the question presented makes it clear that the "arguably governed by" standard is an alternate ground for preemption that differs from the "requires interpretation of" standard. Opp. i. Because the very reason for adopting CBA's is to govern the terms and conditions of employment, under respondents' approach, *any* state law claim pertaining to those terms and conditions, especially those pertaining to the reasons for discharge, would be "arguably governed" by the CBA, as well as by state law. Yet it was this reasoning, employed by the Seventh Circuit in *Lingle*, 823 F.2d 1031 (1987) — *i.e.*, any state claim that could also be brought under the CBA was necessarily dependent on the CBA and therefore necessarily

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(1990); *Alfieri v. CSX Corp.*, 559 N.E.2d 166, 172-173 (Ill. App. 1990); *Hollars v. Southern Pac. Transp. Co.*, 792 P.2d 1146, 1149-1150 (N.M. App. 1989). *See also Quinn v. Southern Pac. Transp. Co.*, 76 Ore. App. 617, 711 P.2d 139, 144 (1985) (pre-*Lingle* decision by court within Ninth Circuit applying same test).

preempted by the LMRA — that this Court rejected when it reversed the Seventh Circuit.

Accordingly, the question whether RLA preemption differs from LMRA preemption is squarely presented by this case, and the Court should grant certiorari to resolve it.

3. Without filing a cross-petition, respondents argue that petitioner's claim is preempted even under *Lingle*. But in order to set up this argument, they discuss the facts solely from their own perspective, although on a motion to dismiss, the complaint's allegations must be taken as true. Thus, the alternate ground for preemption is based on respondents' refusal to acknowledge the grounds for this action — that petitioner was discharged because he refused to perjure himself in statements to the government by misrepresenting his own medical condition.

Perhaps respondents hope to argue that petitioner's claim is preempted, even if the *Lingle* test is controlling, because the CBA here incorporates the administrative procedure for applying for a medical certificate: *i.e.*, the CBA requires employees to maintain a first-class certificate "whenever [the employee] is capable of meeting the [requisite] physical standards." Opp. 15-16. But the fact that respondent TWA has chosen to make the CBA depend on an administrative proceeding to determine when an employee is able to work does not prevent the state of California from protecting its citizens from a compulsion to commit perjury in those proceedings, on pain of discharge. Indeed, many CBA's expressly require the employer to pay workers compensation benefits and thus incorporate workers compensation proceedings in allocating benefits under the CBA. In those cases, if respondents' argument were accepted, claims against discharge in retaliation for seeking such benefits would similarly implicate the CBA and would thus be preempted, a result surely inconsistent with *Lingle*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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